Alliance Bank Malaysia Bhd v Menteri Sumber Manusia, Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-268–07 OF 2016
UMI KALTHUM, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
2 NOVEMBER 2018

Administrative Law — Judicial review — Certiorari — Human Resources Minister ruled that employees in appellant bank designated as Customer Service Executive ('CSE') were not employed in managerial, executive, confidential or security capacities — Whether Minister's decision complied fully with provisions of Industrial Relations Act 1967 and based on in-depth investigations done by Director-General of Industrial Relations ('DGIR') — Whether both Minister and DGIR filed comprehensive affidavits to show what investigations were done and how Minister came to his decision — Whether High Court rightly dismissed judicial review application to quash Minister's decision

The appellant commercial bank implemented a promotion exercise under which its clerical and special grade clerks were given the opportunity to apply for the position of customer service executive ('CSE'). The promotion resulted in their being re-designated as junior officers, thus causing them to cease being members of the National Union of Bank Employees ('NUBE') — which represented the clerical, non-clerical and special grade clerical staff in banks and financial institutions — and become eligible for membership in the Association of Bank Officers, Peninsular Malaysia ('ABOM'). The NUBE discovered that those who were promoted to become CSE were essentially carrying out the same job functions as they did before with an added sales function. Viewing the appellant's exercise as a move to dilute its membership, the NUBE lodged a complaint with the Director-General of Industrial Relations ('DGIR'), who, after carrying out an in-depth investigation, concluded that the CSE were, in fact, carrying out their previous clerical functions (mainly as tellers) and not functions in the managerial, executive, confidential or security capacities ('the excluded capacities'). The DGIR forwarded his investigation report and findings to the Human Resources Minister, who, pursuant to s 9(1D) of the Industrial Relations Act 1967 ('the IRA'), ruled that the CSE were not employees in the excluded capacities. The IRA precluded the NUBE from representing employees in the excluded capacities. The appellant filed for judicial review to quash the Minister's decision. It argued that the Minister, inter alia, had not properly appreciated the job functions of the CSE and that the DGIR's investigation was deficient in

failing to get ABOM's views on the matter. The appellant also contended that the Minister's failure to produce the DGIR's investigation report and findings at the judicial review proceedings was fatal as the court was deprived of sufficient evidence to enable it to determine whether the Minister's decision was right on the facts and the law. The instant appeal was against the High Court's dismissal of the judicial review application. The court had earlier also dismissed ABOM's application to intervene in the proceedings.

Held, dismissing the appeal and affirming the High Court's decision:

(1) On the evidence before him, the High Court judge was not wrong in finding that the Minister had not breached the law in deciding that the CSEs were not employed in the managerial, executive, confidential or security capacities. Any reasonable person similarly circumstanced as the Minister would have arrived at the same conclusion. The Minister's decision was clearly made in the spirit of the IRA (see paras 21 & 23).

(2) There was no evidence that the Minister had veered away from the powers vested in him by the IRA or that he had failed to comply with any requirement of the Act. The decision-making process involving the Minister and the DGIR was carried out in due compliance with the IRA as was evident from the affidavits filed in the proceedings by both the Minister and the DGIR. The affidavits carried the comprehensive details of the investigations done by the DGIR and the manner in which the Minister came to his decision. There was therefore sufficient evidence before the High Court in the judicial review proceedings (see paras 22, 24–26 & 34).

(3) The appellant contended that the Minister's decision was a nullity because neither he nor the DGIR had referred the dispute to the Director-General of Trade Unions for determination as to which union — whether the NUBE or ABOM — was competent to represent the employees concerned. This issue did not arise because the question in the present case was not which of the two unions had the right to represent the employees but whether the Minister's decision on the capacity of the CSEs was correct. The dispute was not between ABOM and NUBE but between NUBE and the appellant over the capacity of the clerks who were promoted to become CSEs. At best, ABOM's interest was only in the outcome of the dispute and even that was rendered inconsequential when its application to intervene in the proceedings was dismissed (see paras 43 & 46–49).

[Bahasa Malaysia summary

Perayu bank komersil telah menjalankan satu latihan kenaikan pangkat yang mana di bawahnya kerani dan kerani gred khasnya telah diberikan peluang

untuk memohon kedudukan eksekutif khidmat pelanggan ('EKP'). Kenaikan pangkat tersebut menyebabkan mereka dikhususkan sebagai pegawai junior, oleh itu menyebabkan mereka tidak lagi menjadi ahli Kesatuan Kebangsaan Pekerja-Pekerja Bank Malaysia ('KKPPBM') — yang mewakili kerani, bukan kerani dan kerani gred khas di bank dan institusi kewangan — dan telah menjadi layak untuk keahlian dalam Persatuan Pegawai Bank, Semenanjung Malaysia ('PPBM'). KKPPBM mendapati bahawa mereka yang memilih untuk menjadi EKP secara asasnya mengendalikan fungsi kerja yang sama seperi dahulu dan dengan satu fungsi penjualan yang lanjut. Memerhatikan latihan perayu sebagai satu tindakan untuk mengurangkan keahliannya, KKPPBM telah memfailkan aduan kepada Ketua Pengarah Perhubungan Perusahaan ('KPPP'), yang mana selepas menjalankan siasatan yang mendalam, memutuskan bahawa EKP tersebut sebenarnya menjalankan tugas pengkeranian mereka (kebanyakkannya sebagai juruwang) dan bukan fungsi dalam kapasiti pengurusan, eksekutif, sulit, atau keselamatan (kapasiti yang dikecualikan). KPPP telah mengemukakan laporan siasatannya dan dapatan kepada Menteri Sumber Manusia, yang mana, selaras dengan s 9(1D) Akta Perhubungan Industri 1967 ('Akta') memutuskan bahawa EKP bukan pekerja dalam kapasiti yang dikecualikan. Akta tersebut mengecualikan KKPPBM daripada mewakili pekerja dalam kapasiti yang dikecualikan. Perayu memfailkan semakan kehakiman untuk mengetepikan keputusan Menteri. Ianya dihujahkan bahawa Menteri, antara lain, tidak mengamati secara tepat fungsi kerja EKP dan bahawa siasatan KPPP adalah cacat apabila gagal untuk mendapati pandangan PPBM berkenaan dengan perkara tersebut. Perayu juga menghujahkan bahawa kegagalan Menteri untuk mengemukakan laporan siasatan KPPP dan dapatannya di prosiding semakan kehakiman adalah fatal kerana mahkamah telah diletakkan dalam keadaan serba kekurangan keterangan mencukupi untuk membolehkannya untuk memutuskan sama ada keputusan Menteri tersebut adalah benar berdasarkan fakta dan undang-undang. Rayuan kini adalah terhadap pengetepian Mahkamah Tinggi terhadap permohonan semakan kehakiman. Mahkamah juga telah mengetepikan permohonan PPBM untuk mencelah dalam prosiding.

Diputuskan, menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Berdasarkan keterangan dihadapannya, hakim Mahkamah Tinggi tidak terkhilaf apabila mendapati bahawa Menteri tidak melanggar undang-undang dalam memutuskan bahawa EKP tidak diberi kerja dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan. Mana-mana orang munasabah yang berada dalam keadaan yang sama seperti menteri tersebut akan sampai kepada kesimpulan yang sama. Keputusan Menteri tersebut adalah dengan jelas dibuat berdasarkan tujuan Akta tersebut (lihat perenggan 21 & 23).

(2) Tiada keterangan bahawa Menteri telah menyimpang jauh dariapda

kuasa yang diberikan kepadanya oleh Akta tersebut atau bahawa beliau telah gagal untuk mematuhi mana-mana keperluan akta tersebut. Proses membuat keputusan melibatkan menteri dan KPPP telah dijalankan dengan mematuhi peruntukan Akta tersebut dan adalah jelas daripada afidavit yang difailkan dalam prosiding oleh Menteri dan KPPP. Afidavit tersebut membawa butiran komprehensif siasatan yang dijalankan oleh KPPP dan cara yang mana Menteri tersebut tiba kepada keputusannya. Terdapat keterangan memadai dihadapan Mahkamah Tinggi dalam prosiding semakan kehakiman (lihat perenggan 22, 24–26 & 34).

(3) Perayu menghujahkan bahwa keputusan menteri merupakan satu pembatalan kerana dia ataupun KPPP tidak merujuk pertelingkahan tersebut kepada Ketua Pengarah Kesatuan Pekerja untuk penentuan berkenaan kesatuan yang mana — sama ada KKPPBM atau PPBM — adalah kompeten untuk mewakili pekerja yang berkenaan. Isu ini tidak berbangkit dan persoalan dalam kes ini bukanlah mana satu daripada dua kesatuan tersebut mempunyai hak untuk mewakili pekerja tetapi sama ada keputusan Menteri atas kapasiti EKP adalah tepat. Pertelingkahan bukan antara PPBM dan KKPPBM tetapi antara KKPPBM dan perayu berdasarkan kapasiti kerani yang dinaikkan pangkat sebagai EKP. Dalam keadaan terbaik pun, kepentingan PPBM adalah keputusan pertelingkahan dan ianya juga akan dijadikan tidak penting apabila permohonannya untuk mencelah dalam prosiding telah diketepikan (lihat perenggan 43 & 46–49).]

Notes

For cases on certiorari, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 411–436.

Cases referred to

Bank Muamalat Malaysia Bhd v Menteri Sumber Manusia, Malaysia & Ors [2019] 2 MLJ 447, CA (refd)

Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors [2007] 3 MLJ 1; [2007] 2 CLJ 97, FC (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Hong Leong Bank Bhd v Menteri Sumber Manusia, Malaysia & Ors [2016] MLJU 1890, CA (distd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Joseph Puspam v Menteri Sumber Manusia, Malaysia & Anor [2001] 4 CLJ 252, CA (refd)

Kennesion Brothers Sdn Bhd v Construction Workers Union [1989] 2 MLJ 419, SC (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337; [1999] 2 CLJ 471, FC (distd)
Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351; [1990] 1 CLJ Rep 186, SC (refd)
Minister of Labour and Manpower & Anor v Wix Corporation South East Asia Sdn Bhd [1980] 2 MLJ 248, FC (refd)
Minister of Labour and The Government of Malaysia v Lie Seng Fatt [1990] 2 MLJ 9; [1990] 1 CLJ Rep 195, SC (refd)
Pahang South Union Omnibus Co Bhd v The Minister of Labour & Manpower & Anor [1981] 2 MLJ 199; [1981] CLJ Rep 74, FC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135; [1978] 1 LNS 143, FC (refd)

Legislation referred to

Financial Services Act 2012
Industrial Relations Act 1967 s 9(1A), (1B), (1D)
Rules of Court 2012 O 15 r 6(2)

Appeal from: Judicial Review Application No 25–228–12 of 2014 (High Court, Kuala Lumpur)

Sivabalah Nadarajah (Reena Enbasegaram with him) (Shearn Delamore & Co) for the appellant.
Ruzaimah Mohd Ridzuan (Shazreen Nadia Zulkipli with her) (Federal Counsel, Attorney General's Chambers) for the first, second and third respondents.
Malik Imtiaz Sarwar (Andrew Yong and Chan Wei June with him) (AmerBON) for the fourth respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] Having heard arguments by both sides, we dismissed the appellant's appeal with costs. We found no reason to interfere with the decision of the High Court dismissing the appellant's application for judicial review to quash the decision of the first respondent ('the Minister'). Our decision was unanimous and these are our grounds for dismissing the appeal.

[2] The salient facts are as follows. Sometime in 2012, the appellant, a licensed bank under the Financial Services Act 2012 and a member of the Malayan Commerce Banks' Association, rolled out a promotion exercise in Peninsular Malaysia whereby its clerical and special grade clerks were given the opportunity to apply for the position of customer service executive ('CSE'), which was categorised under the B1A grade of employees.

A **[3]** At the end of the promotion exercise, a total of 205 clerks accepted their promotions to the position of CSE, which meant they were now employed in the managerial, executive, confidential or security capacities. Their designations were also changed from clerks to junior officers with enhanced roles as reflected in their new job descriptions.

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[4] Being employed in these capacities meant that they ceased to be members of the fourth respondent, the National Union of Bank Employees ('NUBE'), which represents the appellant's employees under the category of clerical, non-clerical and special grade staff.

C

[5] In their new positions as CSEs, the promoted clerks became eligible for membership of the Association of Bank Officers, Peninsular Malaysia ('ABOM') and that consequently they came within the scope of ABOM's representation and no longer within the scope of NUBE's representation.

D

[6] This was the trigger that led to the conflict between the appellant and NUBE, with ABOM waiting on the sidelines with keen interest on the outcome of the dispute. Thus, from NUBE's point of view, the promotion of these clerks to the position of CSEs has the following consequences:

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(a) as the position of CSE is categorised under the B1A Grade of employees, the CSEs could no longer be represented by NUBE as they fall within the scope of ABOM's representation; and

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(b) as a trade union of employees, the size of NUBE's membership is essential in order to carry out its functions.

[7] NUBE later discovered that the CSEs continued to undertake tasks (such as teller work) that were similar to those that they undertook prior to their promotions to the position of CSEs, with only an increased sales function. NUBE saw this as a form of union-busting tactic by the appellant bank as it altered the designation of its staff from clerks to CSEs disguised as a promotion, with the aim of excluding these employees from being members of NUBE.

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H **[8]** NUBE referred its discovery to the second respondent ('the DGIR') vide letter of complaint dated 29 May 2013 in accordance with s 9(1A) of the Industrial Relations Act 1967 ('the IRA').

[9] Pursuant to s 9(1B) of the IRA, the DGIR carried out an investigation into the appellant's branches in Selangor, Kuala Lumpur, Johor and Penang to determine whether the CSEs were employed in the managerial, executive, confidential or security capacities.

I

[10] The DGIR's investigation confirmed that the CSEs were not in fact

employed in the managerial, executive, confidential or security capacities as they were effectively carrying out the functions of tellers and were still ranked the lowest in the hierarchy of employees for the appellant. The finding of the DGIR was forwarded to the Minister pursuant to s 9(1B) of the IRA.

[11] Based on the finding of the DGIR, the Minister on 17 October 2014 decided that the CSEs were not employed in the managerial, executive, confidential or security capacities ('Customer Service Executive (CSE) adalah pekerja-pekerja yang digaji bukan dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan'). The decision was made pursuant to s 9(1D) of the IRA and was made known to the appellant and NUBE by way of a letter dated 23 October 2014.

[12] Dissatisfied with the decision of the Minister, the appellant filed for judicial review to quash the decision.

[13] In the midst of the judicial review hearing, ABOM filed encl 32 pursuant to O 15 r 6(2) of the Rules of Court 2012 to intervene in the proceedings. ABOM asserted that if the decision of the Minister was maintained:

(a) the appellant will be forced to breach the existing collective agreement it had with ABOM;

(b) the membership of ABOM will be affected and this would directly or indirectly affect the membership rights of the CSEs involved; and

(c) the CSEs will be forced to accept a demotion, that is, back to their designation as clerks instead of executives.

[14] Enclosure 32 was opposed by the respondents on the ground that it was made under the wrong provision of the law and that ABOM had no basis to intervene. On 11 May 2016, encl 32 was dismissed with costs. ABOM did not appeal against the decision.

[15] At the substantive hearing of the judicial review, the appellant submitted, inter alia, as follows:

(a) the Minister failed to provide any supporting material in coming to his decision, relying on the decision of this court in *Hong Leong Bank Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2016] MLJU 1890, the facts of which according to the appellant mirror the facts of the present case;

(b) the Minister failed to consider the issue of competency, namely, whether the CSEs were to be represented by NUBE or by ABOM;

(c) the DGIR's investigation was conducted in breach of natural justice and procedural fairness in that the DGIR failed to get the involvement of ABOM in the negotiations; and

(d) the Minister and the DGIR failed to appreciate the job functions of the CSEs.

[16] There is no dearth of authority on the principles relating to appellate intervention in the exercise of executive discretion, one of which is the Supreme Court case of *Minister of Labour and The Government of Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; [1990] 1 CLJ Rep 195 where Hashim Yeop A Sani CJ (Malaya) delivering the judgment of the court said at p 198:

> A general guideline on the functions of the court before the interfering in the exercise of an executive discretion can be found in the judgment of Lord Greene MR in the celebrated case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. The court can only interfere with an act of executive authority if it be shown that the authority has contravened the law. Secondly the court is not a court of appeal in such matters. Thirdly, the exercise of such discretion is governed by certain principles and so long as the exercise is within the four corners of these principles the discretion is absolute and cannot be questioned in a court of law. Lord Greene elaborated on those principles and they are that the exercise of the discretion must be a real exercise of the discretion and that the authority exercising the discretion must consider matters required to be considered and disregard irrelevant collateral matters. If the authority fails to observe these principles, the exercise of discretion cannot be said to be 'reasonable'. Lord Greene then summed up his guideline as follows:
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> > The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confined in them.

[17] It was a reminder by the Supreme Court that the court should not treat judicial review as an appeal. So, the guiding principle is that before the appellate court intervenes, it must satisfy itself that the executive authority (in this case the Minister) had contravened the law by acting in excess of its powers.

[18] Eusoffe Abdoolcader J (as he then was) delivering the judgment of the Federal Court in *Pahang South Union Omnibus Co Bhd v The Minister of Labour & Manpower & Anor* [1981] 2 MLJ 199; [1981] CLJ Rep 74 spoke in similar vein when he said at p 79:

> We can see no reason or justification for interfering with his decision on an application of the principles governing the scope of judicial review we have adumbrated. The court cannot substitute its own judgment for that of the first respondent and will invalidate the exercise of his judgment or discretion only if

satisfied that no reasonable person charged with his statutory responsibilities and with a due and proper appreciation of his statutory duties could have exercised his power in the way that he did (*United Kingdom Association of Professional Engineers & Anor v Advisory, Conciliation and Arbitration Service* [1980] 2 WLR 254).

[19] Every power must have legal limits, otherwise there is dictatorship: see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; [1978] 1 LNS 143 per Raja Azlan Shah Ag CJ (Malaya) (as His late Royal Highness then was).

[20] There is authority to say that in cases involving substantial labour relation elements, such as the present case, the courts should generally pursue a policy of restraint: see the Federal Court case of *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; [1999] 2 CLJ 471 where the apex court said at p 473:

First, we recognise that in the delicate field of labour relations, the High Courts and, indeed, the higher tiers of the Judiciary, should generally pursue a policy of restraint by not involving themselves in issues which move too far from those strict law into those with substantial labour relation elements.

[21] In the present case, having regard to the material before him, we were not persuaded that the learned High Court judge was wrong in finding that the Minister had not breached the law in deciding that the CSEs were not employed in the managerial, executive, confidential or security capacities.

[22] There was no evidence that the Minister had veered away from the powers vested in him by the IRA or that he had failed to comply with any requirement of the Act. We were satisfied, as was the learned High Court judge, that the decision making process involving the Minister and the DGIR had been carried out in due compliance with the relevant provisions of the IRA.

[23] We agreed with the learned judge that any reasonable person similarly circumstanced as the Minister would have arrived at the same conclusion. The Minister's decision was clearly made in the spirit of the IRA: *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351; [1990] 1 CLJ Rep 186.

[24] Both the Minister and the DGIR had gone on affidavit to show that the decision making process was carried out in strict compliance with the law, beginning with the complaint lodged by NUBE under s 9(1A) of the IRA, followed by the steps taken by the DGIR to resolve the dispute under s 9(1B) and finally the Minister's decision under s 9(1D).

[25] The Minister had explained in his affidavit in reply how he came to the conclusion that the CSEs were not employed in the managerial, executive, confidential or security capacities. We reproduce below paras 20–21 of his affidavit in reply:

> 20. ... Saya seterusnya menyatakan —
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> 20.1 telah membuat keputusan berdasarkan penelitian dokumen serta fakta, laporan di peringkat rundingan yang telah diadakan, hasil penyiasatan Responden Kedua, undang-undang dan arahan-arahan yang berkaitan;
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> 20.2 menegaskan bahawa dalam mencapai keputusan yang telah dibuat, saya telah memberi pertimbangan yang munasabah dan sewajarnya dengan tidak menyokong mana-mana pihak;
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> 20.3 telah mengambil kira segala maklumat dan fakta relevan kedua-dua pihak berdasarkan objektif, aspirasi dan semangat Akta 177 untuk mencapai keputusan yang adil dan saksama;
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> ...
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> 21.Selanjutnya, saya sesungguhnya percaya dan menyatakan bahawa dalam membuat keputusan tersebut, saya adalah pihak yang berkecuali dan tidak mempunyai apa-apa kepentingan dalam pertikaian di antara Pemohon dan Responden Kedua.

[26] As for the DGIR, he had explained in detail in his affidavit in reply the steps that he had taken and the matters that he took into consideration in carrying out his investigation, as follows:

> 9. ... Seterusnya saya melalui surat bertarikh 27.06.2013 telah menetapkan satu mesyuarat bersama Pemohon pada 05.07.2013 bagi mendapatkan penjelasan Pemohon berhubung isu kapasiti pekerja-pekerja yang digaji dalam jawatan *Customer Service Executive (CSE).*
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> *Sesalinan surat Responden Keempat bertarikh 29.5.2013 dan surat bertarikh 27.06.2013 dikemukakan di sini dan ditandakan sebagai* 'FKP-1'
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> 10. Saya seterusnya telah memohon Pengarah Perhubungan Perusahaan di pejabat-pejabat negeri Selangor (PPPS), Wilayah Persekutuan Kuala Lumpur (PPPWP), Johor (PPPJ) dan Pulau Pinang (PPPPP) (selepas ini dirujuk sebagai 'PPPS' 'PPPWP', PPPJ' dan PPPPP) untuk mengambil tindakan sebagaimana di bawah subseksyen 9(1B) Akta 177.
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> 11. Selanjutnya saya menyatakan bahawa PPPS, PPPWP, PPPJ dan PPPPP telah menjalankan siasatan bagi menentukan sama ada pekerja-pekerja yang digajikan dalam jawatan CSE termasuk dalam kategori pengurusan, eksekutif, sulit atau keselamatan. PPPS, PPPWP, PPPJ dan PPPPP telah mendapatkan maklumat daripada Pemohon mengenai skop tugas yang dijalankan oleh pekerja-pekerja yang menjawat jawatan-jawatan tersebut dan juga telah menemu bual secara rawak pekerja-pekerja yang digajikan dalam jawatan CSE.
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> 12. Saya seterusnya menyatakan bahawa di antara perkara-perkara yang

ditemuduga adalah berkaitan skop kerja *(job scope),* peranan, tanggungjawab dan maklumat lain berkenaan skop pekerjaan mereka. Tarikh-tarikh siasatan yang telah dijalankan oleh PPPS, PPPWP, PPPJ dan PPPPP masing-masing adalah seperti berikut:

i) PPPS telah menjalankan siasatan tersebut pada 09.09.2013, 10.09.2013, 13.02.2014, 19.02.2014 dan 20.02.2014;

ii) PPPWP telah menjalankan siasatan tersebut pada 09.09.2013, 10.09.2013, 1.11.2013, 13.01.2014 dan 15.01.2014;

iii) PPPJ telah menjalankan siasatan tersebut pada 19.09.2013, 27.01.2014, 28.01.2014 dan 29.01.2014;

iv) PPPPP telah menjalankan siasatan tersebut pada 11.09.2013 dan 24.10.2013.

13. Setelah penyiasatan dilaksanakan, PPPS, PPPWP, PPPJ dan PPPPP telah memaklumkan kepada KPPPM mengenai siasatan terhadap aduan di bawah subseksyen 9(1A) Akta 177. Saya telah memaklumkan kepada Responden Pertama di bawah subseksyen 9(1C) Akta 177 berhubung maklum balas siasatan berhubung pekerja-pekerja yang digaji dalam jawatan CSE.

[27] With regard to the duties of the DGIR under the IRA, the following observations by Mohamed Azmi SCJ in the Supreme Court case of *Kennesion Brothers Sdn Bhd v Construction Workers Union* [1989] 2 MLJ 419 at p 421, paras C–E, right, are relevant:

> Whether a dispute arises s 9(1A) or s 9(3)(c), the Director-General is empowered under s 9(4B)(b) to refer the matter to the Registrar for his decision not only on the question of whether the workmen in respect of whom recognition is being sought are members of the trade union, but also on any question of competency of the trade union concerned to represent any workman or class of workmen in respect of whom recognition is sought to be accorded. It is only when the dispute cannot be resolved by the Director-General that the matter is referred to the Minister for his final decision s 9(5), which may include a decision as to who are workmen employed in the managerial, executive, confidential or security capacity.

[28] The focal point of the appellant's argument was that the learned judge erred in law in failing to rule that the Minister's failure to produce the DGIR's report was fatal. It was submitted that when the decision of the Minister was challenged by way of judicial review, the reviewing court was obliged to undertake an examination of all the material on which the Minister based his decision and that in the absence of such material, his decision cannot be sustained.

[29] Our attention was drawn to the supporting affidavit of the appellant which the appellant alleged was not adequately considered by the learned judge. In the affidavit, the appellant had explained, amongst others:

A (a) the role and responsibilities of the CSEs;

(b) the differences between the job functions of the CSEs and their former clerical functions prior to the promotion;

(c) the job functions of the CSEs; and

B (d) that based on the pith and substance of the nature of their work, the CSEs were executives and the fact that they may occasionally or marginally perform teller functions did not mean that they did not perform executive functions.

C

[30] According to counsel, it was the appellant's prerogative to promote any deserving staff. To support his argument that the Minister's failure to produce the DGIR's report was fatal, learned counsel referred us to the decision of this court in *Hong Leong Bank*. In that case it was held that the Minister's failure to D produce the relevant reports and documents submitted to him by the DGIR rendered his decision a nullity.

[31] It was urged upon us that as the facts of that case are on all fours with the E facts of the present case, the Minister's failure in the present case to produce the DGIR's report on the outcome of the investigation must likewise be held to be fatal. The following passages in the judgment were reproduced by learned counsel:

F [36] We fully agree with learned counsel for the bank that once the decision-making process of the Minister was challenged in a judicial review application, it was incumbent on the Minister to justify the manner by which he came to his decision by exhibiting the relevant reports and documents furnished to him by the DGIR. It was not sufficient for the Minister to make an averment that he had relied on the investigation of the DGIR. In the absence of the reports and documents, the G statement of the Minister that he took into account the report of the DGIR was a bare averment.

...

[39] In consequence, we are of the view that the learned High Court judge erred in failing to consider that the absence of the report of the DGIR referred to by the H Minister in his joint-affidavit in reply had resulted in her inability to meticulously examine all the materials that were said to have been before the Minister when he made the impugned decision.

...

I [41] The facts before the High Court showed that the DGIR did not affirm a separate affidavit exhibiting his report based on his investigation which he had carried out which was then submitted to the Minister.

[42] Consequently, there was no material before the High Court to enable it to confirm that the Minister had acted reasonably in coming to his decision.

[32] With due respect to learned counsel, his reliance on *Hong Leong Bank* was misconceived. The decision in that case must be understood in the context of its own peculiar facts and circumstances. What is clear in that case is that there was a total absence of material before the High Court to enable it to determine whether the Minister had acted reasonably in coming to his decision.

[33] The DGIR in *Hong Leong Bank* did not file any affidavit to explain the steps that he took and the factors that he took into account in investigating the complaint lodged by NUBE. Without such evidence before the court, it would have been impossible for the High Court to determine if the Minister had acted reasonably in coming to his decision. It was principally for this reason that the order of certiorari was held by this court to be justified in reversing the decision of the High Court.

[34] There was no such gap in evidence in the case before us. We have earlier referred to the affidavit in reply of the DGIR in which he explained the steps he had taken and the information that he sought from the CSEs before submitting his report to the Minister. We refer in particular to paras 11–12 of his affidavit in reply.

[35] It was therefore incorrect for learned counsel to say that the facts in *Hong Leong Bank* are a 'mirror image' of the facts of the present case. They are not. It was for this reason that we did not consider the case to be of any assistance to the appellant.

[36] There is a later decision of this court that deals with the same issue. The case is *Bank Muamalat Malaysia Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2019] 2 MLJ 447. Incidentally, the respondents in that case were the same respondents in the present appeal. It was an appeal against the decision of the High Court dismissing the bank's application for judicial review. In the High Court, *Bank Muamalat* had argued, inter alia, that the Minister had erred:

(a) in failing to produce the material on which his decision had been based, despite the challenge against that decision-making process; and

(b) in failing to refer the complaint to the DGTU to determine the competency of NUBE and *Kesatuan Pegawai-Pegawai Bank Muamalat Malaysia Berhad* ('KEPAK') to represent the relevant employees.

[37] On the issue of the Minister's failure to produce the DGIR's report, the learned High Court judge held that the Minister was under no statutory obligation to provide any reason for his decision, or to produce the result of the investigation carried out by the DGIR. For this proposition, he relied on the

decision of this court in *Joseph Puspam v Menteri Sumber Manusia, Malaysia & Anor* [2001] 4 CLJ 252 where Mokhtar Sidin JCA delivering the judgment of the court said at p 258:

> Upon reading *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Another* [1997] 1 CLJ 665, I am of the view that the decision is not the authority where the Minister is compelled to give reasons for his decision. When the Minister refuses or did not give any reasons for his decision that by itself would not nullify the decision.

[38] The decision of the High Court was affirmed by this court on 14 August 2017 but we must state that at the time of writing this judgment, the grounds have yet to be made available. Be that as it may, by affirming the decision, this court must have agreed with the High Court that the Minister's failure to produce the DGIR's report did not nullify his decision. It is inconceivable that this court would have affirmed the decision if it had taken a contrary view.

[39] Perhaps the authority that is most relevant on the issue is the Federal Court case of *Minister of Labour and Manpower & Anor v Wix Corporation South East Asia Sdn Bhd* [1980] 2 MLJ 248 where at p 251, paras E–H, right, the court said:

> As indicated, we are of the view that the steps taken by the Director-General which led him to making the notification to the Minister do not involve the exercise of judicial functions which would require the application of the rules of natural justice. Even in a case where a Government department is entrusted with judicial duties, as in *Local Government Board v Arlidge* [1915] AC 120, the House of Lords held that such Government department determining a housing appeal was not obliged to divulge one of its inspector's report to the appellant even though the report might well have contained relevant statements prejudicial to his case which he might have wished to controvert.
>
> In the present case, the Director-General is merely required to notify the Minister where there is no settlement. We agree with the learned trial judge that a report, if made, is not an official record relating to affairs of State for the purpose of section 123 of the Evidence Act, but this does not make it relevant for the purpose of the present case. Following *Arlidge*'s case, the Director-General or the Industrial Relations Officer conducting the meetings on his behalf is *not obliged to divulge any report he may make to the Minister*. (Emphasis added.)

[40] From the grounds of decision of the learned judge in the case before us, it is clear that he had embarked on an objective and meticulous examination of the factual matrix available before the Minister, which was required of him to do.

[41] In the Federal Court case of *Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2007] 3 MLJ 1; [2007] 2 CLJ 97, Steve

Shim CJ (Sabah and Sarawak) in explaining the phrase 'meticulous examination of the facts' used by Gopal Sri Ram JCA (as he then was) in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, said at p 6:

> [4] Quite clearly, the Court of Appeal takes the view that the reviewing court is under a duty to conduct a meticulous examination of the facts placed before the Minister at the material time. There was much debate before us about the words 'meticulous examination of the facts'. In our view, there is no magic in the use of that phrase. It does not set any universal standard. It is not an inflexible term. It merely means that there should be an objective examination of the factual matrix available before the Minister in order to ascertain whether a reasonable person, similarly circumstanced, would have arrived at the decision which the Minister had done. The extent of that duty had been succinctly stated by Abdoolcader SCJ in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 when he quoted, with approval a statement of Lord Denning HL in the case of *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 at p 1326:
>
> > The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section, it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account or vice versa; or has otherwise gone wrong in law.

[42] The appellant had also raised the point that the learned judge erred in law in failing to rule that the Minister was in error in not referring the dispute to the third respondent, that is, the Director General of Trade Unions ('the DGTU'). It was submitted that this was necessary in view of the fact that there was a competing union representing the same group of employees who were members of the competing union and covered by that competing union's collective agreement with the appellant.

[43] Learned counsel's contention was that it was incumbent on the Minister or the DGIR to first refer the matter to the DGTU for determination as to which union, whether ABOM or NUBE, that was competent to represent the employees concerned. By failing to do so, it was submitted that the Minister had pre-determined the issue, thus rendering his decision a nullity.

[44] The Federal Court case of *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 may throw some light on the point raised by the appellant. At p 363 of the report, this is what Edgar Joseph Jr FCJ said delivering the judgment of the court:

A We recognise, that under s 9(4B)(b), the Director General has a *discretion* whether or not to seek the assistance of the Director General of Trade Unions. But, having regard to the rival claims by ABOM and NUBE to represent the relevant officers, and with the Bank strongly supporting ABOM, the Director General should, at the very least, have gone on affidavit to state *why* he did not pray in aid the views and B experience of the Director General of Trade Unions. Had he done so, then we would have known that he had exercised his *discretion* and on what grounds. We therefore do not consider that he can be taken to have exercised his discretion on the point. Indeed, as we have pointed out, there was no affidavit at all by the Director General.

C **[45]** It is true that in the present case neither the Minister nor the DGIR gave any reason as to why they did not refer the matter to the DGTU but, as rightly pointed out by learned counsel for NUBE, the issue of ABOM's interest in the matter, legal or otherwise, has now become res judicata with the dismissal of encl 32: *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ D 57; *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307.

[46] More importantly, in *Menteri Sumber Manusia*, the dispute was between ABOM and NUBE whereas the dispute in the case before us was not between ABOM and NUBE but between NUBE and the appellant bank. At E best ABOM's interest was only in the outcome of the dispute. Even that has been rendered inconsequential with the dismissal of encl 32.

[47] It must further be noted that the court in *Menteri Sumber Manusia* was F dealing with rival claims by ABOM and NUBE to represent the relevant officers, with the bank strongly supporting ABOM. Again, that is not the case in the present appeal, which only concerns a dispute between NUBE and the appellant bank over the capacity of the clerks who were promoted to the position of CSEs.

G **[48]** What the court had to determine in the present case was not whether it was ABOM or NUBE who had the right to represent the employees, but whether the Minister was right in deciding that the CSEs were not employed in the managerial, executive, confidential or security capacities.

H **[49]** The fatal flaw in the appellants' case in *Menteri Sumber Manusia* was that the DGIR did not affirm and file any affidavit to state why he did not pray in aid the views and experience of the DGTU, given the rivalry between ABOM and NUBE over the right to represent the employees. Clearly, the facts I of *Menteri Sumber Manusia* are different from the facts of the present case, thus making the case irrelevant. In the circumstances, the issue of the Minister's or the DGIR's failure to refer the matter to the DGTU does not arise.

[50] It was for all the reasons aforesaid that we dismissed the appellant's

appeal and affirmed the decision of the High Court. We awarded costs of RM10,000 for each set of respondents. The deposit was refunded to the appellant.

Appeal dismissed, decision of the High Court affirmed.

Reported by Ashok Kumar